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THE SUPREME COURT'S CONSTRUCTION OF THE FEDERAL CONSTITUTION IN 1920-1921, III[1]

IV. POLICE POWER

THE difficulty of classifying cases on the police power has not evaporated since the review of decisions for the preceding year. The headings there suggested are used here. Classification on the basis of the objects of the legislation appears too precarious to be attempted with any confidence. It seems safer to work along the line of the subject matters with which the legislation deals. Certain topics are species of a wider genus, and thus the same case may be put in two or more groups. Readers who are dissatisfied with the classification adopted may be assured of the sympathy of the perpetrator.

1. *Physical Conditions*

A statute of Wyoming having for its declared purpose "the conservation of natural gas" was sustained in *Walls* v. *Midland Carbon Co.*[2] over the dissent of Chief Justice White and Justices Van Devanter and McReynolds. The legislature had declared that the use of natural gas for the products "where" such gas is consumed "without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic pur-

[1] For the preceding instalments reviewing cases on Miscellaneous National Powers, Regulation of Commerce, and Taxation, see 20 MICH. L. REV. 1-23, 135-172, (November and December, 1921).

[2] 254 U. S. 300, 41 Sup. Ct. 118 (1920). See Thomas W. Shelton, "The Police Power Versus Property Rights," 7 VA. L. REV. 455; and notes in 19 MICH. L. REV. 555, 5 MINN. L. REV. 386, and 27 W. VA. L. Q. 255.

poses" is wasteful and "unlawful when such gas well or source of supply is located within ten miles of any incorporated town or industrial plant." Another section of the act specifically forbade the use of gas for manufacturing carbon without fully utilizing the heat for other manufacturing or domestic purposes. The case came before the court on a bill brought by a carbon company to enjoin the attorney general and other state officers from enforcing the statute. There were opposing affidavits as to the wastefulness of the company's methods of making carbon black and as to the ensuing exhaustion of its wells, and the decision is reached without specific findings on these controverted points. It was assumed that use for carbon black is more remunerative than use for heat and light for domestic and industrial purposes, but it was said that, "conceding a power to the state of regulation, a comparison of the value of the industries and a judgment upon them as affecting the state, was for it to make." Without indicating just what quantitative comparison was made between the gallons of ink derived from the carbon black and the cubic feet of gas that might be used for heat and light, Mr. Justice McKenna adduced the averment of the company that 1,000 feet of gas was consumed to produce one and three-quarters pounds of carbon and two-tenths of a gallon of gasoline, and added:

> "We have seen that the method of production by natural gas is like holding a cold plate over a candle, or, as it is expressed by a witness, can only be produced 'by combustion and the impinging of the flame on the metallic surface'; and there is a great disproportion between the gas and the product, and necessarily there was presented to the judgment and policy of the state a comparison of utilities, which involved as well the preservation of the natural resources of the state and the equal participation in them by the people of the state; and the duration of this utility was for the consideration of the state, and we do not think that the state was required by the Constitution of the United States to stand idly by while these resources were disproportionately used, or used in such way that tended to their depletion, having no power of interference."

The act was said to be none the less a conservation measure because limited to wells within ten miles of towns or industrial plants. This limitation was held also not to deny equal protection of the laws to plants within the prescribed zones. The contention of the company that the enforcement of the statute impaired the obligations of preëxisting contracts is mentioned, but is left to fall with the approval of the statute as a proper police measure, with no more specific refutation. One of the allegations of the company was that "the operation of the plant and the recovery of gas from the wells supplying the same would be impossible if the plant should cease to be operated, for the reason that the gas cannot be sold to other users in that locality in sufficient quantities to render the extraction of gasoline therefrom commercially profitable." Whether the court means to decide that the use of the gas for carbon black may be forbidden when this is the only use possible is nevertheless somewhat doubtful, for Mr. Justice McKenna asserts that the statute does not prohibit the use of natural gas absolutely but only wastefully.[3]

The power to fix fire limits and to forbid the erection of wooden buildings therein is necessarily affirmed in *Maguire* v. *Reardon*[4] by the decision that a city will not be enjoined from demolishing a wooden building erected in defiance of such a prohibition. The third and last paragraph of Mr. Justice McReynolds's opinion reads as follows:

> "The meaning and effect of the charter and ordinances thereunder are questions of local law, determination of which by the state courts we commonly accept as conclusive. It is admitted that the building was constructed within defined fire limits, and the supreme court of the state has said that this was contrary to valid regulations then in force. The challenged ordinance must therefore be treated as affecting an unlawful structure, and as so applied we can find no plausible ground for holding it in conflict with the federal Constitution."[5]

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[3] The power to order the destruction of infected trees in order to protect others is considered in 34 HARV. L. REV. 672 and 19 MICH. L. REV. 554.

[4] 255 U. S. 271, 41 Sup. Ct. 255 (1921).

2. *Food, Drink and Drugs*

A Minnesota statute sustained in *Minnesota* v. *Martinson*[6] imposed detailed regulations on the prescription and sale of habit-forming drugs. The offense for which the defendant was convicted was the furnishing by a physician of forbidden drugs to habitual users out of stock kept on hand by him. The chief objection urged against the statute was that it interfered with the enforcement of the federal law imposing a tax on dispensers of drugs. The claimed interference was held not to exist. In answer to a due-process complaint, Mr. Justice Day said:

> "There can be no question of the authority of the state in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs, such as are named in the statute. The right to exercise this power is so manifest in the interest of the public health and welfare that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question."[7]

3. *Occupations and Professions*

A requirement that drivers of motor vehicles should satisfy designated officials as to their competence and be licensed was

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[5] Municipal "zoning" is discussed in 9 CALIF. L. REV. 164, 19 MICH. L. REV. 191, and 30 YALE L. J. 171, 174, 204, 205, 292; the establishment of building lines, in 34 HARV. L. REV. 419, 433, 19 MICH. L. REV. 327, and 7 VA. L. REV. 661; the prohibition of street meetings, in 21 COLUM. L. REV. 275 and 5 MINN. L. REV. 152; the prohibition of an undertaking establishment in certain parts of a city, in 19 MICH. L. REV. 353. For consideration of undertaking establishments and "funeral homes" as nuisances at common law, see 19 MICH. L. REV. 111, 450, and 1 WIS. L. REV. 119. Whether a cotton gin is a nuisance is discussed in 7 VA. L. REV. 661. For consideration of an indirect method of obtaining what cannot be prohibited under the police power, see Alfred E. Cohen, "Racial Restrictions in Covenants in Deeds," 6 VA. L. REG. n. s. 737.

[6] 256 U. S. —, 41 Sup. Ct. 425 (1921).

[7] Laws relating to food are considered in C. P. Berry, "Validity of Laws Regulating Capacity or Dimensions of Containers," 91 CENT. L. J. 247; and notes in 34 HARV. L. REV. 672 on prohibiting the possession of fish in the closed season, and in 19 MICH. L. REV. 739 on requiring hotels using foreign eggs to post a sign to that effect.

held in *Johnson* v. *Maryland*[8] to be inapplicable to drivers of government-owned trucks carrying the mail, because of the interference with a federal function. Justices Pitney and McReynolds dissented. The general power of the state was not involved.

Whether keeping a dog is an occupation depends upon the point of view. At any rate, a New York statute penalizing the owning or harboring of a dog without having the required license was sustained in *Nicchia* v. *New York*.[9] Mr. Justice McReynolds observed that "property in dogs is of an imperfect or qualified nature and they may be subjected to drastic police regulations by the state without depriving the owners of any federal right."

4. *Personal Conduct*

The state espionage law sustained in *Gilbert* v. *Minnesota*[10] made it unlawful to advocate or teach that men should not enlist in the military or naval forces of the United States or should not assist the United States in war. Among the grounds on which it was supported was that it is "a simple exertion of the police power to preserve the peace of the state" by forbidding remarks that provoked others to wrath. As Mr. Justice McKenna puts it:

> "And the state knew the conditions which existed, and could have a solicitude for the public peace, and this record justifies it. Gilbert's remarks were made in a public meeting. They were resented by his auditors. There were protesting interruptions, also accusations and threats against him, disorder and intimations of violence. And such is not an uncommon experience. On such occasions feeling usually runs high and is impetuous; there is a prompting to violence, and when violence is once yielded to, before it can be quelled, tragedies may be enacted. To preclude such result or a danger of it is a proper exercise of the police power of the state."

This part of the opinion is related to the position that the state was not usurping a function belonging exclusively to the national gov-

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[8] 254 U. S. 51, 41 Sup. Ct. 16 (1920).

[9] 254 U. S. 228, 41, Sup. Ct. 103 (1920). 20 MICH. L. REV. 170. See 30 YALE L. J. 426.

[10] 254 U. S. 325, 41 Sup. Ct. 125 (1920). See 15 ILL. L. REV. 530.

ernment. That it does not mean that the state may forbid any and all talk that may evoke a muscular response is to be inferred from the fact that Mr. Justice McKenna went on to give reasons why the particular statute is not "violative of the right of free speech." The momentous question whether "the right of free speech is a natural and inherent right" was left without an authoritative answer. For the purposes of the case Mr. Justice McKenna conceded "that the asserted freedom is natural and inherent," but added that "it is not absolute" but "is subject to restriction and limitation." The restriction imposed by Minnesota was declared to be justified by the decisions that the restrictions imposed by Congress had not violated the First Amendment. Mr. Justice Holmes confined his concurrence to the result. Chief Justice White dissented on the ground that the action taken by Congress had precluded the operation of state law on the same subject. The dissent of Mr. Justice Brandeis was technically confined to positions based on the federal system of government, but he concluded his opinion by saying:

> "As the Minnesota statute is, in my opinion, invalid because it interferes with federal functions and with the right of a citizen of the United States to discuss them, I see no occasion to consider whether it violates also the Fourteenth Amendment. But I have difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial the right of an employer to discriminate against a workman because he is a member of a trade union, * * * the right of a business man to conduct a private employment agency, * * * or to contract outside the state for insurance of his property, * * * although the legislature deems it inimical to the public welfare, does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression. I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."[11]

[11] A case holding that a state in punishing criminal syndicalism is not limited to the definition of treason in the federal Constitution is considered in 19 MICH. L. REV. 746. Prohibitions against loafing are discussed in 27

5. *Incidents of Rights of Action*

A recovery of a penalty and an attorney's fee in a successful action against an insurance company on a policy was sustained in *Hartford Life Insurance Co.* v. *Blincoe*.[12] The company had prevailed on the first writ of error in the United States Supreme Court, but on the retrial in the state court had lost on grounds on which the state decision was held to be final. The question whether, under these circumstances, the company had "vexatiously refused to pay" was held to be a question for the state court, to which was added that it would "be extreme to hold that the statute or its construction is a violation of the Fourteenth Amendment." There was dissent from Justices Holmes, Van Devanter and McReynolds, but whether upon this or upon other points in the case does not appear.[13]

6. *Industrial Relations*

Workmen's compensation legislation came before the court in three cases. The complaint urged against the Ohio law in *Thornton* v. *Duffy*[14] was confined to an amendment which withdrew from employers their previous liberty to insure in private companies and which compelled contributions to a state fund. Such compulsory contribution had previously been sanctioned in sustaining the Washington compensation law, and Chief Justice White concurred solely on the ground of *stare decisis*. His original objections he restated as follows:

W. VA. L. Q. 171, 198; anti-cigarette laws, in 19 MICH. L. REV. 557; and regulations of the hours of dancing, in 9 CALIF. L. REV. 343, and 19 MICH. L. REV. 883. Regulations of the treatment of disease receive consideration in Albert F. Gilmore, "Justice and the Law," 24 LAW NOTES 229; Harry R. Trusler, "Compulsory Sex Hygiene and Examination," 55 AMER. L. REV. 233; and a note in 21 COLUM. L. REV. 90 on state control of venereal disease.

[12] 255 U. S. 129, 41 Sup. Ct. 276 (1921).

[13] The question whether responsibility for injuries caused by automobiles may be put on owners not personally at fault is considered in 6 CORNELL L. Q. 187, 34 HARV. L. REV. 434, 19 MICH. L. REV. 333, and 30 YALE L. J. 427. In 19 MICH. L. REV. 556 is discussion of the question whether a state may limit the dower right of non-residents to land of which the husband dies seized.

[14] 254 U. S. 361, 41 Sup. Ct. 137 (1920). See 15 ILL. L. REV. 531, and 19 MICH. L. REV. 731.

> "To compel an employer to insure his employee against loss from injury sustained in the course of the employment without reference to the negligence of the employee, and at the same time to prohibit the employer from insuring himself against the burden thus imposed, it seems to me, if originally considered, would be a typical illustration of the taking of property without due process of law and a violation of the equal protection of the law."

This seems hardly a correct view of the statute before the court, since the contributions to the state fund were payments for insurance furnished by the state. Mr. Thornton's lament was not that he could not insure himself against loss, but that after he had obtained such insurance from a private corporation he was compelled to insure again with the state. His criticism of the retroactive element in his situation was met by pointing out that the provision in the original statute permitting private insurance was expressly declared to be subject to withdrawal. The inference from Mr. Justice McKenna's opinion is that employers still remained at liberty to deal directly with their employees and to guarantee compensation in other ways than by insurance, provided they did not take out private contracts of insurance. The original statute and the amendment are commented on as follows:

> "The law expressed the constitutional and legislative policy of the state to be that compensation to workmen for injuries received in their employment was a matter of public concern, and should not be left to the individual employer or employee, or be dependent upon or influenced by the hazards of controversy or litigation, or inequality of conditions. There was an attempt at the accommodation of the new policy to old conditions in the concession to employers to deal directly with their employees, but there was precaution against failure in the provision of Section 23 giving discretion to the commission to withdraw the concession. After a few years' experience that discretion was turned into a duty, and by the amendment of March 20, 1917, the concession was taken away from those employers who indemnified themselves by insurance. This was considered necessary to

> execute the policy of the state, and we are unable to yield to the contention that property rights or contract rights had accrued against it. To assert that the first steps of a policy make it immutable is to assert that imperfections and errors in legislation become constitutional rights. This is a narrow conception of sovereignty. It is, however, not new, and we have heretofore been invoked to pronounce judgment against it. Complying, we said that an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercise of it upon the ground that its later exercises deprive of property or invalidate those contracts."

Mr. Justice McReynolds dissented without opinion. He is the only one of the original minority of four objecting to such legislation who still remains recalcitrant.

The complaint unsuccessfully leveled against the Indiana law in *Lower Vein Coal Co.* v. *Industrial Board*[15] was an assumed denial of equal protection of the laws because the compensation act was compulsory for all coal-mining companies, while it was permissive for others except railroads, which were excluded entirely. No specific consideration was given to the different treatment of railroads, but the difference is undoubtedly justified by the fact that state law is not applicable to employees of railroads injured while engaged in interstate commerce and that it would be confusing to apply the provisions of a compensation statute to employees whose injuries might or might not come within the act because of particular circumstances which could not be foreseen. The coal companies brought forward statistics to prove that their business was less hazardous than that of other industries which were allowed to choose whether to come within the compensation act or not. There were opposing claims based on other statistics or on different deductions from the same statistics, and there were statements as to the financial position of mine-owners and mine-workers and as to their situation because of legal departments with regular forces of attorneys, etc. Mr. Justice McKenna prefaced his specific comments by saying generally:

[15] 255 U. S. 144, 41 Sup. Ct. 252 (1921).

> "The length and character of the reports and tables of statistics preclude summary. It may be conceded that different deductions may be made from them, but they and the controversies over them and what they justified or demanded of remedy were matters for the legislative department and that judgment is not open to judicial review. Indeed, there may be a comprehension of effects and practical influences that cannot be presented to a court and measured by it, and which it may be the duty of government to promote or resist, or deemed advisable to do so. Degrees of policies, if they have bases, are not for our consideration and the bases cannot be judged of by abstract speculations or the controversies of opinion. Legislation is impelled and addressed to concrete conditions deemed or demonstrated to be obstacles to something better, and the better, it may be, having attainment or prospect in different occupations (we say occupations, as this case is concerned with them) dependent in the legislative consideration upon their distinctions in some instances, upon their identities in others, and as the case may be, associated or separated in regulation. And this is the rationale of the principle of classification and of the cases which are at once the results and illustrations of it."

To this was added that it is recognized that coal mining has peculiar conditions, that the coal companies indicate that they regard their business as distinctive by seeking to reject the law while other equally hazardous enterprises accepted it. The inducements which made it seem advantageous to the coal companies to reject the legislation "might well have been the inducement to make it compulsory." The fact that there were 30,000 employees engaged in coal mining was also mentioned as material. Another objection urged by the companies was that the act is compulsory as to all of their employees without exclusion of those engaged in non-hazardous or less hazardous work. Reliance was placed on opinions of state courts adducing in favor of employers' liability laws the fact that they were confined to employees engaged in the hazardous work of operating trains. Of this Mr. Justice McKenna said:

> "The contention only has strength by regarding Employers' Liability Acts and Workmen's Compensation Acts as practi-

> cally identical in the public policy respectively involved in them and in effect upon employer and employee. This, we think, is without foundation. They both provide for reparation of injuries to employees, but differ in manner and effect, and there is something more in a compensation law than the element of hazard, something that gives room for the power of classification which a legislature may exert in its judgment of what is necessary for the public welfare, to which we have adverted, and which cannot be pronounced arbitrary because it may be disputed and 'opposed by argument and opinion of serious strength.'"

Earlier it was said that the contention that a difference should be made between the various employees according to the hazard of their special jobs "commits the law and its application to distinctions that might be very confusing in its administration and subjects it and the controversies that may arise under it to various tests of facts and this against the same company."

The only federal question that was raised in *Quong Ham Wah Co.* v. *Industrial Accident Commission*[16] was held to be foreclosed by the construction of the statute by the state court in such a way as to prevent the question from arising. Under the workmen's compensation act of California the power of the commission to award reparation for injuries suffered outside the state in the course of a contract of employment made within the state was in terms confined to injuries suffered by residents of the state. The state court had first construed the statute as it read and held it void under the clause in the federal Constitution guaranteeing to citizens of each state the privileges and immunities of citizens in the several states. On a rehearing the state court held that this constitutional objection, instead of rendering the statute wholly void, should cause a construction of it which would bring citizens of other states within its terms.[17] This construction of a state statute, declared

[16] 255 U. S. 445, 41 Sup. Ct. 373 (1921).

[17] This state decision is discussed in 21 COLUM. L. REV. 369, with special reference to the discrimination against non-residents under the privileges and immunities clause.

Chief Justice White, must be accepted without question by the Supreme Court of the United States.[18]

7. *Commercial Intercourse*

Walls v. *Midland Carbon Co.*,[19] already considered under the head of *Physical Conditions,* sustained a statute which as enforced prohibited the use of natural gas for carbon black and in effect required it either to be conserved or to be sold for heat and light for manufacturing and domestic purposes. *Minnesota* v. *Martinson,*[20] which has been dealt with under the head of *Food, Drink and Drugs,* approved of prohibitions on the sale of habit-forming drugs. Other cases involving statutes regulating commercial dealings will be treated under the head of *Property or Business Affected with a Public Interest.* Interpretations of the Sherman Anti-trust Law have been referred to in the review of cases on the power of Congress over commerce.[21]

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[18] In 3 ILL. L. BULL. 106 is a discussion of administrative determinations in fixing liability under workmen's compensation acts. Minimum wage legislation is treated in 19 MICH. L. REV. 756; statutory penalties for delay in paying wages, in 34 HARV. L. REV. 327. For a series of notes on "Present Day Labor Litigation," see 30 YALE L. J. 280, 311, 404, 501, 618, 736. Picketing and intimidation is discussed in 21 COLUM. L. REV. 103; secondary boycott by employees of a common carrier, in 30 COLUM. L. REV. 882. For articles on phases of labor legislation, see John T. Clarkson, "The Industrial Court Bill," 6 IOWA L. BULL. 153; Milton Dobrzenski, "A Digest of Child Labor Laws and Regulations Applicable to California," 8 CALIF. L. Rev. 404; Henry B. Higgins, "A New Province for Law and Order," 34 HARV. L. REV. 105; William L. Huggins, "A Few of the Fundamentals of the Kansas Industrial Court Act," 7 A. B. A. JOURN. 265; H. W. Humble, "The Court of Industrial Relations in Kansas," 19 MICH. L. REV. 675; Walter J. Mattison, "Limitations of Hours of Labor and Fixing of Minimum Wage Scale on All Public Work by Statute, Ordinance or Contract," 5 MARQUETTE L. REV. 150; William Renwick Riddell, "Labor Legislation in Canada," 5 MINN. L. REV. 83, 243; William R. Vance, "The Kansas Court of Industrial Realtions with Its Background," 30 YALE L. J. 456; and Samuel Williston, "Freedom of Contract," 6 Cornell L. Q. 365.

[19] Note 2, *supra.*

[20] Note 6, *supra.*

[21] In 69 U. PA. L. REV. 365 is a note on credit extension as an unfair practice under the Interstate Commerce Act; in 30 YALE L. J. 630, 632, discussion of contracts not to bid as restraint of trade. Statutes forbidding the scalping of theatre tickets are considered in 8 CALIF. L. REV. 429, 19 MICH. L. REV. 871, and 5 MINN. L. REV. 68. Blue sky laws are treated in 25 LAW

8. *Methods of Enforcement*

Exercise of administrative power to enforce police regulations will find illustration in a later section on *Administrative Power and Procedure.* Administrative action in regulating prices and in enforcing other requirements on public utilities appears in a number of the cases included under *Property or Business Affected with a Public Interest. Nicchia* v. *New York*[22] allows a state to use a private corporation to aid in the enforcement of a law requiring dogs to be licensed. *Goldsmith-Grant Co.* v. *United States,*[23] already reviewed in the section on TAXATION, holds that the government may confiscate an automobile carrying liquor in violation of the revenue laws, although title is in an unpaid conditional vendor not implicated in the fraud. The opinion leads to the inference that similar methods may be used to enforce prohibitions of a police character.[24]

9. *Property or Business Affected with a Public Interest*

This rather vague caption is used to mark off cases involving special duties, restrictions or obligations upon businesses that are recognized as "public utilities" or "public service companies" and upon possible peripheral enterprises which have some but not all of the elements of public utilities pure and undefiled. The use of a label is dangerous because of the likelihood that some may wrongly assume that whatever regulation may be imposed on one member of the class may necessarily be imposed on all. It may be misleading, too, because it may induce the assumption that the regulation is justified because the business is a public utility, whereas the more satisfactory analysis is that the propriety of the regulation is the

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NOTES 45; prohibition of contracts for contingent fees by attorneys, in 30 YALE L. J. 82; a requirement that an insurance company must reject applications for hail insurance promptly on penalty of having them treated as accepted, in 5 MINN. L. REV. 224. Another restraint on commercial intercourse is dealt with in T. J. O'Donnell, "Review of Fight Against Trading Stamps," 6 A. B. A. JOURN. 167.

[22] Note 9, *supra.*

[23] 254 U. S. 505, 41 Sup. Ct. 189 (1921), 20 MICH. L. REV. 157.

[24] The forfeiture of automobiles illegally transporting liquor is dealt with in 20 COLUM. L. REV. 798, 34 HARV. L. REV. 200, 212, 19 MICH. L. REV. 350, 1 WIS. L. REV. 117, and 30 YALE L. J. 91.

justification for so classifying the enterprise. To the danger of confusing the cart with the horse is added the more serious hazard of reasoning in a circle and justifying the regulation by the legal quality of the enterprise when that is dependent upon the propriety of the regulation. This much, however, is clear. Some enterprises are, and some enterprises are not, constitutionally liable to be subjected to regulation of their prices and to the imposition of the duty to serve all, to furnish adequate facilities and to bear special burdens which may be made conditions of their enjoyment of their special powers. Under the due-process clause an enterprise may contend that it is immune from all of these special and peculiar requirements or immune from some though not from all. It may object to excessively rigorous requirements when concededly more moderate ones would be proper. This review is concerned with the specific things which may or may not be done to the specific complainants, and readers are hereby forbidden to infer anything else from any rubric that it may carry.

(a) Inclusion in the Class for Price Regulation. Two cases by votes of five to four sustained statutes restricting landlords in raising rents and in ousting tenants. In neither case was there involved the question whether the particular restriction was so severe as to leave the landlord less than the requisite "fair return on the fair value" of his property. *Block* v. *Hirsh*[25] involved an act of Congress which, as paraphrased by Mr. Justice Holmes, provided that

[25] 256 U. S. —, 41 Sup. Ct. 458 (1921). See George W. Goble, "Are Property Interests Secure?" 9 KY. L. J. 149; and notes in 9 CALIF. L. REV. 337, 19 MICH. L. REV. 869, 5 MINN. L. REV. 472, 7 VA. L. REG. n. s. 52, and 7 VA. L. REV. 655. For discussion of the constitutional issue prior to the Supreme Court decision, see Harold G. Aron, "The New York Landlord and Tenant Laws of 1920," 6 CORNELL L. Q. 1; Alan W. Boyd, "Rent Regulation under the Police Power," 19 MICH. L. REV. 599; Jefferson B. Browne, "The Super Constitution," 54 AM. L. REV. 321; Charles Kellogg Burdick, "Constitutionality of the New York Rent Laws," 6 CORNELL L. Q. 310; W. F. Dodd and Carl H. Zeiss, "Rent Regulation and Housing Problems," 7 A. B. A. JOURN. 5; George W. Wickersham, "Recent Extensions of the State Police Power," 54 AM. L. REV. 801, and "The Police Power and the New York Emergency Rent Laws," 69 U. PA. L. REV. 301; John H. Wigmore, "A Constitutional Way to Reach the Housing Profiteer," 15 ILL. L. REV. 359; and notes in 21 COLUM. L. REV. 172, 34 HARV. L. REV. 426, 15 ILL. L. REV. 537, 16 *id.* 65, 19 MICH. L. REV. 95, 437, 6 VA. L. REG. n. s. 688, and 7 VA. L. REV. 30.

the right of a tenant in the District of Columbia to occupy the leased premises "is to continue notwithstanding the expiration of his term, at the option of the tenant, subject to regulation by the Commission appointed by the act, so long as he pays the rent and performs the conditions as fixed by the lease or as modified by the Commission." In reliance on this statute a tenant defended an ejection proceeding brought after the expiration of his lease by a landlord who had bought the building while the lease was running. The statute recited that the legislation was necessary because of emergencies growing out of the war resulting in conditions embarrassing to the government in the transaction of the public business. The act was limited to two years. Mr. Justice Holmes observed that while these declarations in the statute did not conclude the courts, they were entitled to great respect and in this instance "stated a publicly notorious and almost world-wide fact." The existence of the emergency, he said, "must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries in the world." He prefaced his answer by saying:

> "The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly, circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance, * * * irrigation, * * * and mining. * * * They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest, * * * and that the public interest may extend to the use of land. They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair."

The right of regulation is said not to be limited because the property affected is tangible in character. Rights in such property have been limited under the police power by limiting the height of build-

ings, requiring safe pillars in mines, regulating billboards and requiring watersheds to be kept clear. Mr. Justice Holmes then continues:

> "These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if to answer one need the legislature may limit height, to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature, but they certainly are not less pressing. * * * Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."

In sustaining the reasonableness of the measure, its temporary character is relied on. The machinery for securing the landlord a fair rent is held adequate, though the courts do not fix the rent, since they will decide whether the rent fixed is confiscatory. The provision for allowing the tenant in possession to remain "is an almost necessary incident of the policy and is traditional in English law." While the loss of the chance to profit by the sudden influx of population is a part of the value of property, the policy of restricting such profits is accepted in taxation and "it goes little if at all farther than the restriction put upon the rights of the owner of money by the more debatable usury laws." If the end in view otherwise justifies the means used, it is not the concern of the courts "whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired." They cannot be held to have no relation to the end in view when the legislation is similar to that resorted to all over the world.

In dissenting, Mr. Justice McKenna insists that there is no relation between the means employed and the end professed. If the law keeps one tenant in it keeps another out. The statute therefore does not supply homes to the homeless. All the contentions urged in favor of the statute have heretofore been pronounced untenable by the court, says Mr. Justice McKenna. It has been declared that the provisions of the Constitution are not suspended by an emergency. The fact that the law is of temporary duration is immaterial, since "as a power in government, if it exist at all, it is perennial and universal and can give what duration it pleases to its exercise." The analogies adduced in the majority opinion are declared to be wholly inapposite. "They justify the prohibition of the use of property to the injury of others." Of the cases concerning mining, insurance and irrigation it is said that it is difficult to handle them or the assertion of what they decide, and that "an opposing denial only is available." To Mr. Justice McKenna the law seems to offend against the due-process clause, the provision that private property shall not be taken for public use without just compensation and the prohibition against laws impairing the obligation of contracts. "The prohibitions need no strengthening comment. They are as absolute as axioms. A contract existing, its obligation is impregnable." Much of the dissenting opinion consists of laudation of the Constitution and exhortation to keep its commandments, with direful vaticinations based on the assumption that the court is sanctioning a breach of the Constitution rather than holding that the laws before it do not violate its inhibitions. "The wonder comes to us, what will the country do with its new freedom." If it impairs the obligation of contracts for the leasing of buildings, will it repudiate its bonds? The reference to similar legislation in other countries evokes the comment:

> "The facts are significant and suggest the inquiry, have conditions come not only to the District of Columbia embarrassing the federal government, but to the world as well, that are not amenable to passing palliatives, and that Socialism, or some form of Socialism, is the only permanent corrective or accommodation? It is indeed strange that this court, in effect, is called upon to make way for it and, through an instrument of a Constitution based on personal

> rights and the purposeful encouragement of individual incentive and energy, to declare legal a power exerted for their destruction. The inquiry occurs, have we come to the realization of the observation that 'War unless it be fought for liberty is the most deadly enemy of liberty.'"

Has the Constitution, continues the rhetorical questioning, "suddenly become weak—become not a restraint upon evil government, but an impediment to good government?" "Has it become an anachronism, and is it to become 'an archeological relic,' no longer to be an efficient factor in affairs, but something only to engage and entertain the studies of antiquarians?" "Is not this to be dreaded —indeed, will it not be the inevitable consequence of the decision just rendered?" These questions are not given specific answers in the majority opinion. Chief Justice White and Justices Van Devanter and McReynolds joined in the dissent of Mr. Justice McKenna.

The New York statute sustained in *Marcus Brown Holding Co.* v. *Feldman*[26] was similar to the congressional act, and the proceeding was an ejectment to get possession of an apartment which the tenant continued to occupy after the expiration of his lease. The objection that the statutory authorization to remain in violation of the tenant's covenant to leave at the end of his term is an impairment of the obligation of contracts was met by Mr. Justice Holmes by saying that "contracts are made subject to the exercise of this power of the state, when otherwise justified, as we have held this to be." The discrimination involved in confining the statute to certain cities was held to be justified by the difference in the situation of those cities and the rest of the state and so not a denial of equal protection of the laws. The requirement that the landlord render certain services in keeping the apartment habitable was resisted "on the rather singular ground that it infringes the Thirteenth Amendment," but the services were thought sufficiently remote from personal services to save the compulsion to render them from amounting to involuntary servitude. Mr. Justice McKenna, in dissenting, put aside the cases holding that contracts

[26] 256 U. S. —, 41 Sup. Ct. 465 (1921). For discussion of this decision and of the decision in the court below, see references in note 25, *supra*.

are made subject to proper exercises of the police power by saying that "there is not a line in any of them that declares that the explicit and definite covenants of private individuals engaged in a private and personal matter are subject to impairment by a state law." If the state have a power superior to the contracts clause of the Constitution, "it is superior to every other limitation upon every power." While the majority opinion, continues Mr. Justice McKenna, concedes some limitation on rent regulation, there is no definition of it, "and the reasoning of the opinion, as we understand it, and its implications and its incident, establish practically unlimited power." The peroration is as follows:

> "We are not disposed to further enlarge upon the case or attempt to reconcile the explicit declaration of the Constitution against the power of the state to impair the obligations of a contract or, under any pretense, to disregard the declaration. It is safer, saner, and more consonant with constitutional preëminence and its purposes to regard the declaration of the Constitution as paramount, and not to weaken it by refined dialectics or bend it to some impulse or emergency 'because of some accident of immediate, overwhelming interest which appeals to the feelings and distorts the judgment.'"

Chief Justice White and Justices Van Devanter and McReynolds concurred in this dissent.[27]

(b) Regulation of Rates. The issue presented by the pleadings in *Vandalia Railroad Co.* v. *Schnull*[28] was whether a state may enforce unremunerative rates on a certain class of traffic so long as the intrastate rates as a whole are remunerative. The decision

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[27] In 9 CALIF. L. REV. 440 is a note on what is a public utility; in 19 MICH. L. REV. 94, one on whether a cab is a public utility; in 19 MICH. L. REV. 74, one on regulating the price of coal; and in 19 MICH. L. REV. 649, one on regulating the price of school books. A somewhat earlier phase of the general problem is considered in Roland G. Kent, "The Edict of Diocletian Fixing Maximum Prices," 69 U. PA. L. REV. 35. The contemporary problem receives attention in Minor Bronough, "State Regulation of Wages and Prices of Commodities," 24 LAW NOTES 205; and Nathan Isaacs, "The Revival of the Justum Pretium," 6 Cornell L. Q. 381.

[28] 255 U. S. 113, 41 Sup. Ct. 324 (1921). See 16 ILL. L. REV. 133 and 19 MICH. L. REV. 744.

is somewhat nebulous owing to the fact that the case is devoid of mathematics. Mr. Justice McKenna declares that previous cases have settled that the legislature "is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business," and that the court will not substitute its judgment for that of the legislature when reviewing "a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitableness of the intrastate business as a whole is not involved," but that, on the other hand, the carrier cannot be compelled to transport a particular class of traffic "at a loss or without substantial compensation or to carry a particular commodity "for less than the proper cost of transportation, or virtually at cost." This is said to be a principle "which keeps power and right in proper relation"—"power not exercised in excess, right not used in abuse." The case was sent back to the court below "for further proceedings not inconsistent with this opinion." The state court was reversed in its holding that the profitableness of the intrastate business as a whole cured any deficiency in the rates on particular traffic, but it was not told how remunerative the particular traffic must be.[29]

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[29] There were no Supreme Court decisions during the past term on the question of the "fair value" of the carrier's property as a basis for rate regulation or on the requisites of the procedure for fixing rates or for objecting to their unconstitutionality. The problem of valuation receives consideration in Robert L. Hale, "The 'Physical Value' Fallacy in Rate Cases," 30 YALE L. J. 710; and notes in 6 CORNELL L. Q. 122 on amortization of a short-lived plant, in 21 COLUM. L. REV. 166 on the unearned increment and the depreciated dollar, in 34 HARV. L. REV. 85 on change of conditions making confiscatory a rate previously found to be remunerative, and in 19 MICH. L. REV. 849 on increasing dissatisfaction with the cost-of-reproduction rule. In 15 ILL. L. REV. 284 is a note on Kansas City So. Ry. v. Interstate Commerce Commission, 252 U. S. 178, 40 Sup. Ct. 187 (1920), 19 MICH. L. REV. 26, note 46, which required the Interstate Commerce Commission to discover the hypothetical cost of present original construction of existing roads for the information of Congress. A question of statutory construction with regard to the power of a state commission to fix a rate after a statutory rate has been declared invalid is considered in 34 HARV. L. REV. 680.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. 527 (1920), 19 MICH. L. REV. 142, which held that a carrier is entitled to independent judicial consideration of the facts material to the question of confiscation, is the subject of consideration in Laurence Curtis, 2nd, "Judicial Review of Commission," 34 HARV. L. REV. 862; Ernst Freund,

In *Southern Iowa Electric Co.* v. *Chariton*[30] and *San Antonio* v. *San Antonio Public Service Co.*[31] it was conceded that rates imposed on street railroads by ancient city ordinances had with the passage of time become confiscatory, and the determining question in the cases was whether these ordinances were contracts by which the companies were bound. An examination of the provisions of the state constitutions and statutes convinced the court that the cities were without the power to contract and that therefore the rates could no longer be enforced now that they had become confiscatory.[32]

Two cases involve the effect on past transactions of adjudications that schedules of rates imposed by the state are valid or invalid. In 1907 North Dakota prescribed a schedule of rates. The carrier declined to put it into effect. The state secured an injunction against further disobedience and this was affirmed by the United States Supreme Court "without prejudice to the right of the carriers to reopen the cases if an adequate trial of the schedule in the future enabled them to prove that it was confiscatory." After a time the carrier petitioned the state court to set aside the rates on the ground that experience proved them confiscatory. The court heard the cases, but found the rates remunerative and continued the existing injunctions. This was reversed by the United States Supreme Court. A shipper who had been charged more than the statutory rates prior to the litigation in which the rates were first sustained sued to recover the excess, claiming that the adjudication of the validity of the statute involved the invalidity of rates charged in disobedience to it. The carrier contended that the fact that this first decree was "without prejudice," etc., meant that it was interlocutory merely and that the later adjudication that the statutory rates were confiscatory superseded the contrary prior adjudication. In *Minneapolis, St. P. & S. S. M. R. Co.* v. *C. L. Merrick Co.*[33]

"The Right to a Judicial Review in Rate Controversies," 27 W. VA. L. Q. 207; Thomas P. Hardman, "Judicial Review as a Requirement of Due Process in Rate Regulation," 30 YALE L. J. 681; and a note in 69 U. PA. L. REV. 148.

[30] 255 U. S. 539, 41 Sup. Ct. 400 (1921).

[31] 255 U. S. 547, 41 Sup. Ct. 428 (1921).

[32] An analogous issue is considered in C. Brewster Rhoads, "The Police Power as a Limitation upon the Contractual Right of Public Service Corporations," 69 U. PA. L. REV. 317.

[33] 254 U. S. 376, 41 Sup. Ct. 142 (1920).

the Supreme Court sustained the decision of the state court in favor of the shipper, holding that the first decree concluded all past matters. In *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Washburn Coal Co.*[34] the railroad sued a shipper for compensation in excess of the statutory rates for carriage after the affirmance of the statutory schedule and before it was declared confiscatory. The state court decided in favor of the shipper on the ground, not that the statutory rates were valid, but that the carrier had not asked for more and the shipper had not contracted to pay more, that the injunction against disobeying the statute had been granted without taking any bond or imposing any terms or conditions for the security of the carrier, and that the shipper was no more responsible than the carrier for what had occurred and therefore was not unjustly enriched. The Supreme Court sustained the state court for the reason that it did not uphold the statutory rate as such, but rested its decision on independent grounds which "are broad enough to sustain the judgment, and, if not well taken, are not without substantial support." Such federal questions as might be involved in the state decisions were declared not to be reviewable on writ of error.

A private consumer of gas in the District of Columbia complained in *Hollis* v. *Kutz*[35] of what he thought an unlawful discrimination because he was charged less than the government and less than what he would have been charged had the government been charged more. To this Mr. Justices Holmes replied:

> "We do not wish to belittle the claim of a taker of what for the time has become pretty nearly a necessity to equal treatment while gas is furnished to the public. But the notion that the Government cannot make it a condition of allowing the establishment of gas works that its needs and the needs of its instrument the district shall be satisfied at any price that it may fix strikes us as needing no answer whatever. The plaintiffs are under no legal obligation to take gas nor is the Government bound to allow it to be furnished. If they choose to take it the plaintiffs must submit

[34] 254 U. S. 370, 41 Sup. Ct. 140 (1920).
[35] 255 U. S. 452, 41 Sup. Ct. 371 (1921).

> to such enhancement of price, if any, as is assignable to the Government's demands. We do not consider whether the Commission has power to raise the price to the excepted class, because, even if it has, the plaintiffs have no right to require equality with the Government, and they have no other ground upon which to found their supposed right."

The "excepted class" referred to consisted of certain other takers not named who were charged still less than the government.

(c) Regulation of Use of Highways. A state command to remove fifteen grade crossings by building one bridge for the highway and by constructing fourteen underpasses was sustained in *Erie Railroad Co.* v. *Board of Public Utility Commissioners*[36] over the dissent of Chief Justice White and Justices Van Devanter and McReynolds. The chief complainant was an interstate railroad using the tracks under a perpetual lease which provided that if for any reason the lease should be terminated the lessors should pay for all improvements. The company contended that the cost imposed on it would be over $2,000,000, that it had only $100,000 available, and that the financial position of the lessor was so weak that it would never be able to reimburse the lessee for the improvements in case the lease were terminated. The latter objection was answered by saying that in that event the lessor would have the property and it would be subject to their obligation. On the general question it was declared that "whatever the cost" the road may be required not to imperil the highway over which it does business. On the question of the existing peril, the small number of accidents which had already occurred was held not controlling, since the situation was inherently dangerous, and the judgment of the state board and the state court was accepted. It was recognized that the state officials, in their anxiety for the well-being of the state, had hardly given due weight to the burden imposed on the company, but their action was held, nevertheless, within their constitutional powers. Cases relied on by the roads were put to one side by saying that "the power of the state over grade crossings derives little light from cases on the power to regulate trains." To this Mr. Justice Holmes added:

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[36] 254 U. S. 394, 41 Sup. Ct. 169 (1921).

"Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroad and the public using them. Generally the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and that it necessarily frequents, the state, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It was said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. * * * If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce. * * * Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty."

Street railroads objected because compelled to pay ten per cent of the cost of removing the grade crossings over which they ran, and the steam railroad objected because the street railroads were not required to pay more. A water company resented being required

to pay for the cost of moving its pipes, and owners of private sidings disrelished the dislocation of their connections which the improvements would cause. These minor matters were held to be within the major power exerted. The fact that most of the highways were laid out after the steam road had been built was not allowed to affect the exercise of the power.[37]

The complaints unsuccessfully advanced in *Detroit United Ry.* v. *Detroit*[38] were amorphous, but amounted in substance to the insistence that an ordinance requiring a board to proceed to acquire, construct, and operate a municipal street railroad is an unconstitutional attempt to compel the existing private company to sell its equipment at less than its fair value. The franchise of the complainant had expired and various ordinances permitting it to continue to operate were held not to give it anything more than a temporary and repealable license. It had already been held that the company could be required to remove its tracks, and Mr. Justice Day informed it that "if the city has the right to acquire the property on the best terms it can make with the company in view of the expiration of its franchises, an attempt to carry out such purpose by an offer to buy at much less than its value would not have the effect to deprive the company of property without due process of law." The court refused to consider complaints that the voters had been misled by the city officials, and it agreed with the court below that the submission of the question to the voters was in substantial compliance with the law.

(d) Services and Facilities. Though a statute requiring the construction of a roadway for vehicles and a pathway for pedestrians on a railroad bridge was sustained in *International Bridge Co.* v. *New York*[39] as an exercise of the reserved power to amend the charter of the resisting corporation, it was declared also that the the legislation complained of did not violate the Fourteenth Amendment. The company had relied on the due-process as well as on

[37] A requirement to light the streets under a viaduct is treated in 5 MINN. L. REV. 81; the compulsory elimination of grade crossings, in 69 U. PA. L. REV. 371.

[38] 255 U. S. 171, 41 Sup. Ct. 285 (1921).

[39] 254 U. S. 126, 41 Sup. Ct. 56 (1920), 20 MICH. L. REV. 140-141. Chief Justice White and Justices McKenna and McReynolds dissented without telling us upon which one or ones of the several questions in the case.

the obligation-of-contracts clause. Since the court found that the company came under the duty to build these additional facilities by a statute consolidating two existing corporations and making the new creation subject to all the duties of each of the constituent members, the case cannot be said to declare that the later statute specifically requiring the roadway and pathway could stand alone. Nevertheless, the treatment of the issue in the opinion of Mr. Justice Holmes is not inconsistent with the theory that the statute was a proper exercise of the police power unless it interfered with existing contractual rights. Either deliberately or carelessly, Mr. Justice Holmes has succeeded in keeping us in doubt on the interesting question whether the police power alone is capable of compelling a bridge built for trains to add facilities for teams and pedestrians.

(e) Privilege of Ceasing Business. In sustaining the requirement to remove grade crossings in *Erie Railroad Co.* v. *Board of Public Utility Commissioners,*[40] Mr. Justice Holmes remarked that "if the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce." The same point was involved in a roundabout way in *Bullock* v. *Florida.*[41] A foreclosure decree in a state court authorized a sale of an insolvent railroad with the privilege of dismantling it. The state commission secured from a higher state court a writ of prohibition against confirming so much of the sale as authorized the dismantling. "The ground of the decision was that in the absence of statute a railroad company has no right to divert its property to other uses without the consent of the state and that the lower court had no jurisdiction to make the prohibited portion of the decree in a proceeding in which the state was not a party until after the decree had been made." This was held to raise a federal question, since the so-called jurisdiction of the court depended solely on the rights of the parties. As to this question, Mr. Justice Holmes declared:

> "Apart from statute or express contract, people who have put their money into a railroad are not bound to go on with

[40] 254 U. S. 394, 41 Sup. Ct. 169 (1921), note 36, *supra.*
[41] 254 U. S. 513, 41 Sup. Ct. 193 (1921).

> it at a loss if there is no reasonable prospect of profitable operation in the future. * * * No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the state and have been allowed to exercise the power of eminent domain. * * * Without previous statute or contract, to compel the company to keep on at a loss would be an unconstitutional taking of its property."

Nevertheless, the state court was allowed to issue its prohibition against expressly authorizing dismantling, because the purchaser would without such express permission have the same right as his vendor. This right, observed Mr. Justice Holmes, may be exercised merely by stopping operations without prior consent of the state, if the facts justify it.[42]

V. Eminent Domain

Condemnation proceedings by the United States government brought four cases to the Supreme Court. *United States* v. *Rogers*[43] and *United States* v. *Highsmith*,[44] in applying the established principle that just compensation must be compensation as of the time when private owners are deprived of their property, allowed interest from the time when lands were flooded by the works constructed by the government. The flooding involved in *Bothwell* v. *United States*[45] caused the destruction of hay on the lands taken and the enforced sale of cattle at prices below their true value. No compensation for these items was allowed in the condemnation proceedings. The owners, instead of appealing, brought an action against the government in the court of claims, which gave judgment for the value of the hay but not for the loss on the cattle. The government did not appeal, and so the Supreme Court refused to consider whether compensation for the hay was rightly given. As to the cattle, Mr. Justice McReynolds said:

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[42] In 9 Calif. L. Rev. 435 and 27 W. Va. L. Q. 95 are notes on Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, 40 Sup. Ct. 183 (1920), 19 Mich. L. Rev. 137, which allowed a lumber company to abandon the operation of an unremunerative railroad.

[43] 255 U. S. 163, 41 Sup. Ct. 281 (1921).

[44] 255 U. S. 170, 41 Sup. Ct. 282 (1921).

[45] 254 U. S. 231, 41 Sup. Ct. 74 (1920).

> "Certainly appellants' position in respect of the items in question is no better than it would have been if no condemnation proceedings had been instituted. In the circumstances supposed, there might have been a recovery 'for what actually had been taken, upon the principle that the government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require.' * * * But nothing could have been recovered for the destruction of business or loss sustained through enforced sale of the cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation. We need not consider the effect of the judgment in the condemnation proceedings."

United States v. *Coronado Beach Co.*[46] sustained an award of the value of an entire island taken by the government. The issue whether the company owned the tide lands in front of the upland of the island was decided in its favor, and a reservation in an old grant of power in the government to take the land for arsenals, etc., was held not to impose a servitude which entitled the government to displace private owners without compensation.[47]

Columbia University. THOMAS REED POWELL.

(To be continued)

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[46] 255 U. S. 472, 41 Sup. Ct. 378 (1921).

[47] For discussions of questions of eminent domain, see Minor Bronough, "Æsthetic or Sentimental Purpose as 'Public Use' within Meaning of Law of Eminent Domain," 24 LAW NOTES 89; and notes in 15 ILL. L. REV. 278 on finality of determination of necessity for taking by a railroad corporation, in 19 MICH. L. REV. 448 on condemning land in another state under reciprocal state statutes, in 5 MINN. L. REV. 394 on whether interurban service is an additional servitude, and in 7 VA. L. REV. 656 on condemnation of property already devoted to a public use.